

Supreme Court, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

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IN THE  
**Supreme Court of the United States**

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**NO. 77-1073**

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LEE PHARMACEUTICALS,  
*Petitioner,*

v.

UNITED STATES DISTRICT COURT FOR THE  
CENTRAL DISTRICT OF CALIFORNIA,  
*Respondent.*

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DEN-MAT, INC., ROBERT IBSEN, W. RICHARD GLACE,  
FRED H. BROCK AND PROFESSIONAL PRODUCTS CO.,  
*Real Parties In Interest.*

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**APPENDIX TO  
PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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EDWARD S. IRONS  
MARY HELEN SEARS  
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1a

**ORDER**

**Filed November 3, 1977**

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**No. 77-3361**

**LEE PHARMACEUTICALS,**  
*Petitioner,*

**vs.**

**UNITED STATES DISTRICT COURT FOR THE  
CENTRAL DISTRICT OF CALIFORNIA,**  
*Respondent,*

**and**

**DEN-MAT, INC., ROBERT IBSEN, W. RICHARD GLACE,  
FRED H. BROCK AND PROFESSIONAL PRODUCTS CO.,**  
*Real Parties in Interest.*

**ORDER**

**Before: BROWNING and SNEED, Circuit Judges.**

Upon due consideration, the petition for writ of mandamus and emergency motion for various forms of relief are denied.

/s/ James R. Browning

/s/ Joseph F. Sneed  
United States Circuit Judges

2a

ORDER

Filed July 12, 1977

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

No. 77-1969

LEE PHARMACEUTICALS,  
*Petitioner,*  
vs.

UNITED STATES DISTRICT COURT FOR THE  
CENTRAL DISTRICT OF CALIFORNIA,  
*Respondent,*  
and

DEN-MAT, INC., *et al.*,  
*Real Parties in Interest.*

ORDER

Before: CHAMBERS, HUFSTEDLER and ELY, Cir-  
cuit Judges.

Upon due consideration, the petition for writ of man-  
damus is denied.

/s/ [Illegible]

/s/ [Illegible]

/s/ [Illegible]

United States Circuit Judges

3a

ORDER

Filed July 26, 1977

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

No. 77-1969

LEE PHARMACEUTICALS,  
*Petitioner,*  
vs.

UNITED STATES DISTRICT COURT FOR THE  
CENTRAL DISTRICT OF CALIFORNIA,  
*Respondent,*  
and

DEN-MAT, INC., *et al.*,  
*Real Parties in Interest.*

ORDER

Before: CHAMBERS, ELY, and HUFSTEDLER, Cir-  
cuit Judges.

Upon due consideration, petitioner's request for re-  
consideration is denied.



**ORDER No. 48 DENYING PLAINTIFF'S MOTION FOR  
DISQUALIFICATION OF THE ASSIGNED JUDGE**

**Filed February 18, 1977**

Plaintiff's attorneys have called upon the court to disqualify itself pursuant to the provisions of Title 28 U.S.C. § 455(a). This section provides:

"(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

It is apparent from the affidavits of Ms. Sears, filed in support of this and earlier motions, that she has become angry with this court because of a series of adverse rulings which apparently have frustrated her litigation strategy. Ms. Sears has a perfect right to disagree with this court's views and to challenge them in some higher court. But a disagreement of this kind forms no basis for disqualifying a judge.

The court recognizes its responsibility to view plaintiff's accusations objectively and impartially, and to disqualify itself if its "impartiality might reasonably be questioned." But this court also recognizes its responsibility to pursue with all diligence the management of a case assigned to it and to make such judgments from time to time as circumstances require to the end that the controversy may be expeditiously litigated and a fair and just result obtained.

This court has reviewed its recollection of the record in light of plaintiff's charges, and concludes that there are no facts upon which the impartiality of this court might reasonably be questioned.

IT IS THEREFORE ORDERED that the motion to disqualify this court is denied.

DATED: February 18, 1977

/s/ Jesse Curtis  
JESSE W. CURTIS  
United States District Judge

**ORDER No. 49 DENYING PLAINTIFF'S RENEWED AND  
SUPPLEMENTAL MOTION FOR DISQUALIFICATION  
OF ASSIGNED JUDGE**

**Filed March 8, 1977**

Proceeding under Title 28 U.S.C. § 455(a), the plaintiff has requested this court to disqualify itself from hearing further proceedings in this case, and has further moved that such motion be referred to another judge for decision. This court has considered but denied plaintiff's original motion for disqualification without referring the matter to another judge. Plaintiff now renews its motion for disqualification of this court under section 455(a) of Title 28 U.S.C. and again requests that its motion be referred to another judge for ruling.

Section 455(a) of Title 28 U.S.C. requires the judge who is presiding to make a decision as to whether his impartiality might reasonably be questioned in the subject matter litigation. This section does not contemplate such a decision being made by any one other than the judge whose impartiality is in question. I would consider it an abdication of my duty to assign this motion to any other judge for a ruling.

In accordance with this section, I have considered all relevant matters bearing on the subject of this court's impartiality and have concluded as set forth in my order dated February 18, 1977 that in my judgment there is no basis upon which this court's impartiality might reasonably be questioned.

Attached to "Plaintiff's Renewed and Supplemental Motion" is a memorandum, a certificate of Ms. Sears, and an affidavit of Henry L. Lee, Jr., setting forth allegations and conclusions upon which they base their continued effort to persuade this court to disqualify itself. I find nothing in the additional papers which would

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justify this court in changing its original ruling. Plaintiff's renewed and supplemental motion for disqualification is denied.

DATED: March 7, 1977

/s/ Jesse W. Curtis  
JESSE W. CURTIS  
United States District Judge

7a

**MEMORANDUM TO CHIEF JUDGE STEPHENS**

**Filed July 20, 1977**

The plaintiff in the above entitled action has on three occasions sought to disqualify me to sit further in this matter, invoking the provisions of Title 28 U.S.C. § 455 (a), which provides:

"(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

I have denied these motions upon the ground that the only basis for disqualification which has been cited is that I have made certain rulings adverse to the plaintiff. Several of these rulings including the refusal to disqualify myself, have been brought before the Ninth Circuit. All of the appeals and petitions for writs have been denied or dismissed, except for one appeal from an order imposing sanctions on the plaintiff and awarding attorneys' fees to the defendants in the sum of \$1200. This appeal is presently pending.

Plaintiff has just filed in CA No. 77-1969, the affidavit of one Leon Yochelson, who purports to be a psychiatrist in Washington, D.C. Based upon his reading of documents furnished him by the plaintiff, Yochelson opines that I have demonstrated by my conduct that I am not capable of a detached and objective determination of the question of whether my impartiality in this action might reasonably be questioned.

I do not believe that there are any facts set forth in the papers read by Yochelson, or otherwise, upon which anyone might reasonably question my impartiality. Nevertheless, I request that you refer this matter to the Chief Judge of the Ninth Circuit, with the view that some

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judge outside of this district be assigned to review the case and my conduct and to determine whether there is any basis upon which my impartiality might reasonably be questioned.

DATED: July 20, 1977

/s/ Jesse W. Curtis  
JESSE W. CURTIS  
United States District Judge

9a

**ORDER OF THE CHIEF JUDGE**

**Filed August 19, 1977**

Judge Jesse W. Curtis in a Memorandum to Chief Judge Stephens filed July 20, 1977, has requested that some judge outside the Central District of California be assigned to review the affidavits and averments filed in the above captioned case in support of plaintiff's contention that Judge Curtis should be disqualified and to determine whether there is any basis upon which his impartiality might reasonably be questioned.

Therefore, pursuant to the request of Judge Curtis set forth in the above described Memorandum, IT IS HEREBY ORDERED that the Honorable Martin Pence of the District of Hawaii is assigned to review and rule upon the matter specifically identified herein above. This is not a reassignment of the captioned case and at all times Judge Curtis shall retain complete jurisdiction to proceed in the said case in any manner he deems advisable.

DATED: Aug. 19, 1977

/s/ [Illegible]  
United States District Judge



**EXCERPT FROM  
REPORTER'S TRANSCRIPT OF PROCEEDINGS  
BEFORE HONORABLE MARTIN PENCE**

**PLACE:** Los Angeles, California

**DATE:** Wednesday, September 14, 1977

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[Commencing at p. 77, l. 23]

\* \* \* \*

**THE COURT:** You will gather, from what I am about to say, that I have worked upon this motion to disqualify Judge Curtis and motions for disqualifications are not unknown to me. I have had motions filed before. Sometimes, even under the old rule, I have either disqualified myself or have refused to. One of the cases is out of the Ninth Circuit, Botch [sic. Botts] versus United States, I think was an appeal of my refusal to recuse myself. At least at that time I sustained.

In March of this year I had 158 pages of moving papers filed that I should have recused myself on a case that has been going on for five years. As I said, I have not yet filed my decision in that case for publication and it took me 58 pages to analyze the moving papers, and if I write an opinion on this, I'll be taking 58 pages to analyze the moving papers here.

I do not think, however that it is necessary as I have understood the plaintiff's motion that it is the sum totality of the rulings of Judge Curtis and the statements made in the course of his orders and that some of them were less than accurate and correct and that he was violating rules of Civil Procedure in handling the case to the best of his ability without following the rules, and that the sum totality not resulting in the best interest of the plaintiff would lead a reasonable person to conclude that under the new rule for disqualification that he was prejudiced or biased against the plaintiff and partial to the defendant.

Now, the Court notes in this case the motions in the matter, the motions for disqualification, a pattern which characterizes many of the plaintiff's motions throughout this litigation.

On February 14th, a motion was filed and then another one—was it supplemental? Yes—on May 20th, another motion for disqualification was filed, and then

after it had been determined by Judge Curtis that he would request Judge Stephens to appoint some other judge to sit on his motion for disqualification, more motions were filed to determine that I was not the proper person who should sit and decide this case.

Now, it is the privilege of counsel on either side to file any and all the motions they want to. It is also the privilege of the judge to determine whether or not he will give those motions consideration and whether he will rule on them.

There is no right, in the absence of a specific rule, there is no right to have argument to hear the motion when a paper is filed, so that there is no question that Judge Curtis has been faced by a great amount—and this is just a little mole hill on the mountain, I think, and I hold up the documents that have been filed in connection with this motion to disqualify him.

It is already an inch and a half or two inches high, and that doesn't indicate that that isn't good or that it is good, but I am just saying that there has been a tremendous amount of activity on the part of, it looks like both counsel, and particularly in connection with this motion here, on the part of plaintiff's counsel in the filing of, almost every time, a motion to reconsider on some ground—not that it is bad, but nevertheless, there has been a motion to reconsider on practically every one. I am not saying that it is not a motion to be considered.

So the analysis of the law involved here, and I take it the great judge—I will leave out the "great"—a judge can read from that U.S.—you can read what the Court of Appeals had intended for Judge Ritter. You can see the language. And with anyone that is familiar with him, some of this was mild compared with other cases. And a word of advice to counsel, you being outside counsel, if you have never appeared before Judge Ritter, don't ever go over there unless you have got local counsel with a pipeline at your ear all the time and even

then, it is rare that you will come out and escape without scars.

The Supreme Court has had problems, but anyhow, let's take a look at 455(a) which, no question about it, 455(a) is broader than the old statute that says that he shall disqualify himself in any proceeding where his impartiality might reasonably be questioned. I will stop right here. I will ask Mr. Irons a question here whether or not the Senate hearings indicated that a judge could not personally sit upon his own disqualification under 455(a)?

I would also hold that there is no requirement where in every case a judge disqualifies himself to pass upon his own disqualification. Each case must be handled on its own merits. Thus, I would find no fault with Judge Curtis for having a first go-around to refuse to disqualify himself. It was decided on the second go-around that some outside judge should look at it and the judge should look at the facts alleged objectively.

Now, in analyzing these two motions of the plaintiff seeking to disqualify Judge Curtis, the basis of the February 14th motion was that the totality of his orders and rulings and statements made in connection with the matter before him in the specific litigation under consideration here demonstrate to any reasonable man a marked partiality against the plaintiff and plaintiff's counsel. And the way in which the second motion for disqualification was worded led me to believe that a motion, in effect, the moving papers led me to believe that it was a question to disqualify Judge Curtis on order No. 59 filed on April the 25th, concerning the appointment of a special Master, and that Judge Curtis had thereby conceded his inability to consider the technicalities of this case.

However, that isn't the way you argued, Mr. Irons, so I will go along—

MR. IRONS: May I make a comment?



THE COURT: Oh, yes.

MR. IRONS: Your Honor, we filed a first motion. We filed a renewed and supplemental motion. Those are the ones I addressed and we filed another one that your Honor has just mentioned, and I did not avert to that one in my argument.

THE COURT: I thought you meant to cover that by virtue of the way you did take it up and I thought I heard you say—I thought that you were covering or saying it by shifting the impact of it.

MR. IRONS: Well, I don't want to reargue and I don't want to abandon the one you mentioned.

THE COURT: Do you want to abandon the second one?

MR. IRONS: No, I don't want to abandon anything, of course.

THE COURT: I understand your position. You were in failure to argue the second point, but you haven't abandoned it. But you want the appointment of the Master and what occurred subsequently and whether or not the Master should be disqualified to be taken up in full flow of all that Judge Curtis did in determining whether or not—

MR. IRONS: Yes, sir.

THE COURT: —his conduct showed reasonable doubt and therefore he should step down. So we will go down to your motion.

You see, you don't make the Court's work any easier by filing one motion and a supplemental to that and then a supplemental and then a supplemental, but I will address myself to your February 14th motion.

Basically, your first ground, as I understand it, was that Judge Curtis subordinated issues relating to trademark infringement and trade secret misappropriation and so forth to the patent validity issue, that it could only be assumed—and I am quoting you the precise statement—

is because of the partiality of Judge Curtis for the defendants.

I have said in close of your argument that a judge is not an umpire, and if he thinks a case should go this way instead of that—regardless of whose head the axe might fall—nevertheless, that is the way it is going to go. And in the absence of something more cogent, the mere fact that he did decide to be a judge and say that this is the way it is, that is not grounds for disqualification.

As it were, I could just qualify it right now with the patent case I have right here in this drawer, as I have said, "This is the way it is going to be tried—one, two, three—and I am not going to worry about infringement." That is one of the first things set out in a case and maybe in this one too. So that we will leave for the wind standing alone or with the rest which does not float very far in the direction that you wish even though, as you urged, that the order was without a hearing and you asked for an opportunity to be heard and you felt preliminary injunctive relief was needed and the Court didn't provide you, the plaintiff, with an adequate explanation for the ordering.

Now, as I have said before, there is no rule that says that in every case, there has to be a hearing before a judge makes a decision on any motion. And the fact that a judge doesn't feel a preliminary injunction is needed now or that something else could be done first rather than the second, and the fact that the Court doesn't explain what he bases the orders on, those standing alone or all together are awfully weak indications of any partiality on the part of the judge either way, but they are there and that is your argument—they are there.

I don't know if any of you have ever appeared before Judge Lane, but you would be lucky there if you got a kind word in explanation about his ruling. He never would have taken the time that I am taking to rule. He



just would have said the reason he gave for it—that, you know, if he didn't give any ground, it is awfully hard to appeal. They don't know the basis of your decision. Let them find out why.

Now, I don't know if it goes quite that far, but the law is clear that the judge doesn't have to give explanations for everything he does. So that's the first.

The second ground that I want to mention is that the December 1, 1976 order denied plaintiff's request for a stay pending appeal. He prejudged the preliminary injunction issue which was the second ground which I believe you stated.

Now, the judge in that order made certain statements that—I think this is the quotation—the hearing on the requested preliminary injunction were to be held on the state of the record the assumption is that it would have to be denied.

Now, there hasn't been any judge who hasn't said just exactly that same phrase in substance. He wasn't prejudging he was simply stating his analysis of the case as it then stood and a judge has the right to properly go ahead and make statements and, of course, analyze a motion before him as to what he sees on the merits and demerits underlying and on top of the motion. And the fact that he made such conclusions based upon the record before him does not mean that he has decided the case or that he is partial or impartial. All that it indicates is that he in the exercise of his judgment, reaches certain conclusions.

Now, I will advert to this just momentarily: You must always remember that what conclusions a judge arrives at if based upon the record before him with any degree of reasonable accuracy, doesn't have to be perfect; but if in the conclusions made during the course of the litigation there is any reasonable basis for that conclusion, that cannot—no matter how it hurts—that cannot be

grounds for disqualification, even under the new 455(a). And I will advert to this later.

Now, the third ground was that in the September of 1976 order, Judge Curtis stated that plaintiff's counsel had been twice informed by telephone of certain information and so on, and no such conversations ever took place and, therefore, it is incorrect; and the Court didn't explain and correct the misstatement as the orders were intended to, according to the analysis.

Now, I will state here that in the conduct of the litigation and the complexity of the papers filed as in this one here, bear in mind that indeed a judge should not be given to remember or explain the "t" that had or had not been crossed or the "i" that had or had not been dotted. If it were material as to whether or not the telephone calls had taken place, then perhaps corrections would be noted.

Now, it might be arguable on appeal that it would appear that plaintiff's counsel had all the notice in the world. Didn't the Judge say that twice he tried to call? And the Court of Appeals would hold the representation that the Judge—in the complexity of this case with a mass of motions, orders, motions, motions and orders—the Court of Appeals would say what I am about to say, that it was completely irrelevant whether or not the plaintiff's counsel was informed by telephone or otherwise. And so from that, this Court will find but a slight if any, indication of bias or prejudice on the part of Judge Curtis, even if he refused to explain or correct what is alleged to have been a mistake.

The judges sometimes say, "It doesn't make a bit of difference and I am not going to make anything more about it. I have ruled." And that is what Judge Curtis did here.

Then again it is argued that that same December 1st, 1976 order is incorrect regarding the postponement and

consent of both parties so that discovery could be conducted. Ms. Sears—is it Ms. M-s. or M-i-s-s?

MS. SEARS: I call it Miss.

THE COURT: All right. Miss Sears has very forthrightly stated the possible basis for Judge Curtis' "incorrect" statement; that flows from what I just now said concerning the third ground in the motion. And if the judge was in error, under the circumstances, the error could not be blamed upon partiality—not reasonably, in the light of the explanation of Ms. Sears.

Now, another thing he also misstated or stated incorrectly is that the discovery on the trade secret issue had exploded into impossible proportions, and there is as a matter of fact, very little. As I have listened to counsel here today, I would say that perhaps the word "impossible" was not exactly correct, but it is clear from what I have seen and what I have read from the record and what I have heard that the trade secret issue has been a very well gnawed upon bone of contention by both sides here and has resulted in perhaps not as much discovery as plaintiff feels they should have had and perhaps in more discovery than plaintiff feels that defendant should have had. But in the analysis, the balancing, of Judge Curtis to say that because he held the trade secret issue had exploded to impossible proportions, on the basis of the record here, would be making a mountain out of another small mole hill. Namely, that the use of the term "impossible proportions," in the light of the whole picture, indicates that he made that statement because of bias for the defendant and prejudice against the plaintiff. And those statements—misstatements, calling them that because the plaintiff does—taken together, I would not, as a judge who has been on the Court of Appeals many times, I would not say that would be any prejudice that would influence the Appellate Court or give the defendants an unfair advantage, nor do I find anything in there at all to indicate that that was the intent of Judge Curtis.

Then again, in the Court's December 1st order denying plaintiff's request for stay pending appeal wherein Judge Curtis said he felt it was frivolous and he set forth his conclusion that it was a maneuver on the part of the plaintiff to further delay the lawsuit and he said that the conclusion is implicit in plaintiff's suggestion that a stay might well force the defendant to settle because of their inability to further finance the litigation.

Now, first of all, I state flatly that there is nothing in any of the rules or regulations or laws that was ever intended to deny to judges of the court the same First Amendment rights enjoyed by those who are not judges of the court. Rare indeed is it, in the course of a lawsuit, that a judge doesn't, from the conduct of counsel, from the pleadings before him, from his observations of what has occurred, as a matter of fact, of what has been agreed upon, that he does not reach conclusions and he has a right to state those conclusions if they are based upon the record before him.

We are not dealing here with Judge Ritter who said, "Let's not have any conversation. Jawbone is not permitted in this courtroom. You fellows from San Francisco might as well find that out now."

And then counsel said, "Your Honor, first of all, I would like to plead to the Court some of the problems involved in responding to your order."

And then, "I don't want to hear your problems at all. I want you to deliver the documents and deliver the documents with the information in ten days from air express courier," and so on.

Some of you may remember that in Los Angeles, you have some judges who just about every so often the Court of Appeals takes off to one side and spanks in the course of handling the case before them. I have been on the Court of Appeals and one of the judges down here got solemnly spanked. It didn't change him, but he was spanked. It didn't change the result.



The Court of Appeals is firm, so that I state now that courts have the right and it was never intended by 455 (a) that courts be curtailed in stating forthrightly its own analysis of the conduct of the parties as it appears to that court under those circumstances.

Once I had a case down there in Hawaii in which I found when the plaintiff took the stand, he didn't know the meaning of the truth. And I made those specific findings and backed them up by Code number and section. Then in another case wherein the same party was supposed to be a witness, his attorney came in and said, "Your Honor, he is not here today. He just came back and he is sick." And I said, "You'll have a doctor's affidavit by tomorrow. You know the reason."

Now, a judge has every right to say that because if he has made his determination in the course of a ruling regarding any aspect of any witness' testimony before him, he is not barred from referring back in another case to a doubt, a doubt, that he had regarding the integrity of that witness. So here it is perfectly proper for a court to state that an appeal is frivolous. We do it all the time. And that doesn't mean we're partial to or biased against one side or the other, nor is a judge to be condemned for postulating as he sees the situation, based upon the facts, the suggestion that a stay might well force the defendants to settle because of their inability to further finance litigation.

That could be simply a conclusatory statement of the judge and, standing in the context of this case, certainly, and almost in any other case, would not be an indication of bias or prejudice against one side or the other but simply an analysis of that judge as he saw what was going on before him in that case, and he has a right so to state.

Certainly, recognizing always that any rule of law which a judge makes must be conditioned on the facts of that particular case for that to stand good, and so it is here.

Now it is argued that the judge set forth in the November 23rd, 1976 order, referring to what the judge said were the plaintiff's reasons that an adverse ruling in the state action in conjunction with the expensive nature of the present litigation would cause the defendants to be faced with financial ruining.

That argument was never made.

Without holding that it was or wasn't on the record, it would be simply that the judge, from what he heard, would have a right to rationalize and that he made such a statement would not indicate that he was ruling as he did because he was biased or prejudiced, but he was ruling as he did because of perhaps an error of interpretation. And, under those circumstances, this is, Mr. Irons, I told you in the beginning what is wrong with your remedy on appeal that you stated. But nevertheless, motion for disqualification is never a substitute for—and you know it. We all know it.—a substitute for taking an appeal. And you, certainly, Mr. Irons, are not reticent about taking appeals. The record here so indicates.

Now, the sixth point was that the affidavit of counsel's staff and the affidavit of the law clerk of Judge Curtis indicates that Judge Curtis' law clerk spoke to members of the law firm wanting to discuss the plaintiff's position on trade secrets, whether they wanted any further discovery procedure, whether it would be acceptable to defendants in court.

As I have indicated, every judge has their own rules regarding how much law clerks can do. But having had about 40 law clerks of varied degree of intelligence and understanding, one thing they usually don't do, they usually don't go off just completely on their own. They usually want to do something because the judge says, "Find out what their position is on this."

In other words, it is an informal discussion. It is never intended that those informal discussions shall be a

matter of record unless that disclosed from it clearly and unmistakably was of such a nature as to change a very important aspect of one party's case or the other.

Analyzing the motion on ground six regarding ex parte communications with one side or the other, standing in the posture of this case, I could not find that it created an "appearance of partiality."

And the seventh overlapped. And again, the law clerk was simply attempting to find out whether the proposal would be such that both sides and the Court would agree to it and he wouldn't. You could take an interpretation if you wanted to stretch it, Mr. Irons, that as you argued here in your motion and lumped them together in your argument, that the statement indicated that Judge Curtis had abdicated some portion of his responsibility in deciding a controverted issue in the case to his law clerk.

Now you can look at it subjectively from your standpoint and maybe arrive at that conclusion, but objectively, I take the very words of the law clerk himself. He was not going to make the decision. He was going to refer the matter back to the Court as it is done unless you have an idiot as a law clerk; and there is no indication that this law clerk was an idiot.

Certainly judges correct rulings. When the time that you have anyone as infallible as Judge Yankwich, you have genius, but only a few geniuses exist in one generation. Judges too are known to be in error. The Court of Appeals calls that to their attention often, even in small lines. But it is the custom and practice of a judge, when it has been called to his attention that he made a conclusion in error, to try to reflect it in the record. Some judges have even confessed error. I am one of those judges. One time in 1963, I decided the law should be a certain way, and after I had a lot more experience, I confessed that I was wrong in 1963, seven years later; and I didn't feel any lesser because of that.

I don't think any of the judges do unless their ego is a lot larger than that of Ritter's.

So there was no abdication of responsibility on the part of Judge Curtis indicated, as I review this record here, when he gave certain responsibilities to his law clerk.

Then again, number eight, Judge Curtis' reaction to a motion for full disclosure of off-the-record communications between defense representations and court personnel. If we are to condemn Judge Curtis because he felt the motion was outrageous, impertinent, frivolous, and contemptuous, I would not find under the circumstances, after reading six and seven, I would not find that his reaction was not impartial.

He may have felt that counsel was endeavoring to use the Court's time and efforts on something that was of no importance whatsoever insofar as the ultimate disposition of the basic problems of the case were concerned. I would not find that met as a grounds, even though if you say his words were not temperate—I would not say that they were intemperate—if you find the words were not temperate, that would not, in connection with all I have recited before, lead me to say he showed a degree of partiality for the plaintiff or the defendant or a degree of impartiality where the plaintiff is concerned.

Ground nine was just a general ground and not detailed evidence of vilifications of plaintiff or its counsel. I cannot from that find any facts—f-a-c-t-s—I cannot find any facts which are the basis upon which the Court rules to indicate from that ground that Judge Curtis was biased or prejudiced at all.

Now, when a judge finds that a motion is frivolous, that is a ruling made in the course and conduct of trial and he may pick any figure that he feels should be reasonable under the circumstances whether it is the actual cost or not. And the amount of \$1,200 is not so



horrendous as to shock the conscience when a sanction of that size is imposed upon counsel of the standing that I am sure the firm of Irons & Sears has.

Now again, rare indeed is the judge that hasn't lowered the boom on counsel because counsel has done something that that judge feels under the circumstances has taken up his court's time and caused other counsel to have spent all of his effort. And if that comes as a decision based upon the record, that finding, under the circumstances, is not one to indicate partiality; it is one in which error may be claimed.

Remember Judge Kilkenny once imposed a fine of \$500 because counsel persisted in delaying, so Kilkenny thought, in delaying the proceedings. It was right here in Los Angeles.

Now, some judges wouldn't have done it, but he did; and the Court of Appeals, they sustained it. They didn't dislike that simply because he thought he was delaying the proceedings.

So here, if the judge decides that a motion under the circumstances is frivolous, he has a right to say so and his saying so is not evidence of partiality. If he wants to lower the boom on counsel for filing that motion, he has a perfect right to do so, and if he is wrong, they will tell him so on appeal in the answer that comes back—"Next subject. Let's go." That has happened many times for most judges. And the conclusion of course is that there had been a marked change in the climate—that's counsel's argument—there had been a marked change or alteration in the climate of the Court since the judge's rulings in and since October of 1976.

Now I notice that counsel here would refer to the record here. It seems that almost every order filed was followed by a motion for reconsideration. Most judges don't give motions for reconsideration the time of day unless there is something new and different about the motion that was not considered, or unless the error urged

was of such materiality as to have an effect upon the ultimate conclusion of the litigation. So that if a judge refused to hear motions for reconsideration, the only recourse is to go on appeal because litigation can become involved enough without chewing the cud two or three times. A judge does not have the stomachs of a cow. He has only one. And the result is that most judges are full. They've had it. They wait until the next meal before they eat again. So I hold here that Judge Curtis perfectly and properly had a right to hold that the motion was frivolous under the circumstances, and was entitled to do as he did. We have here, you see, no basis indicated from any outside source. The only thing we are concerned with is the bias flowing in the judicial context of this case and if what was done and said by a judge in the courts of the judicial handling of the litigation, unless there is something therein which makes it as manifest as was done in the Ritter case, where there is the totality which indicates that you are not going to get a fair deal with that judge, then the motion for disqualification must fail.

Now all that is required under 144 or 455(a) of 28 U.S.C. is that the affidavit must set forth the facts and reasons, and the facts must be specific. The subjective conclusory allegations and speculations don't make up for the lack of objective facts. I am not convinced by the plaintiff's memorandum in support of his motion for disqualification that the facts set forth, the specific facts set forth, individually or collectively, are sufficient to convince any reasonable man that Judge Curtis had an underlying bias and prejudice for either side in this case.

There are a number of conclusory allegations and assumptions made in the Court's orders but that, as I said, is insufficient.

The facts and rulings themselves must show to a reasonable man the bias or prejudice in looking at what was done here. I again state that an affidavit which

alleges that in a judicial proceeding that the judge, by his rulings and his orders—now I am talking about his rulings and orders—indicated bias or prejudice, standing alone, is not sufficient unless that which was said in those rulings and orders manifest to a reasonable person that the foundation was based upon subjective feelings of bias and prejudice on the part of the judge and could not be founded upon the facts of that particular case.

It isn't alleged there are any outside sources, but you must have it squarely within the context of the case that the sum total of all of the facts alleged or any one particular has been such that an objective hearing would say only clearly was bias and prejudice in favor of one side or the other. Bias and prejudice cannot be drawn from just the bare bones of an order or of a ruling when it is shown that the order or ruling did have a basis arising out of the facts before the Court.

So insofar as the motion for disqualification based upon that first set of grounds set forth, the February 14th motion and subsequent additions thereto, which I might state are not to be favored and bear that in mind.

MR. IRONS: Yes, sir.

THE COURT: You were supposed to get one shot at the pigeon and if you miss it, you are out of the money.

Now the May 20th motion—If something new comes up that you didn't have before, that's different; but if you are supposed to put down in that first shot everything that has transpired up to the day you file that motion, then you are not supposed to have a second and third chance to keep on it because you happen to think about it afterwards.

Now I again repeat, the second ground, the May 20th motion concerns something which took place afterwards and you can file that. And then you can say and it is going to be argued later on that that is just another

indication and let's go back and take all that we had before. Maybe it wasn't that then but it may be now. And whether or not your statement regarding order No. 59, filed April 25, 1977, wherein Judge Curtis stated he felt the alleged trade secrets consisting of experimental and chemical processes were of such a nature that the Court felt he didn't have all of the expertise required, and the way he put it was that "it required some expertise which this Court does not possess."

Now that is an artfully worded statement, because he didn't say he didn't have some, he indicated that there was some that he didn't. And the inference could be that there is some that he did have.

The rule regarding Rule 53 of the Federal Rules to which you adverted, I think that maybe I will agree with you, Mr. Irons, that there are certain methods by which Masters should be appointed. Normally those are followed. In the absence of the contact which Kendrick had through his daughter and through his association with Furth in connection with some antitrust cases, I think that—knowing Kendrick myself and having had him up here before me and having him before me in one of the cases I am handling now—his reputation is high and his expertise in the area of patent litigation is considerable. And standing alone, I do not feel that his selection could be faulted.

But certainly I will agree with you, there shouldn't have been any question whenever the facts came to the attention of the judge, no matter who called it to his attention, that Kendrick was out. There is no problem about that. And because you might have felt that the judge was wanting to keep Kendrick does not indicate—because that is subjective, not factual—does not indicate to the Court here, when Kendrick was not kept, that the Judge was biased and prejudiced because you felt subjectively that he wanted to keep Kendrick. Maybe



he did, but maybe he didn't. Certainly he couldn't. I cannot even be sure that he could even if you agreed.

But you know that courts do have an inherent power to depart from the rules to appoint Masters. My goodness me, any time in any complex case that you are going into the field of economics or you are going into the field of chemical patents, where indeed is the judge who has the conceit to feel that he knows so much that he can decide a case without having a disinterested party analyze all the mass of information before him so that he can see the plus of the plaintiff's case and the minus of the defendant's case and the, hopefully, neutral analysis of each. Not that he will agree with his Master; that doesn't always occur either.

And the judge is rare indeed who says "Yes, because the Master has decided. That isn't the way it is. You know that. Whatever the Master comes out with he has to report; and what he reports, counsel can argue and tear apart and do what they please with it and then the judge makes his own decision for himself. The Master doesn't make it for him.

And so Curtis was well within his ability to appoint one, and if he subsequently decided that at that time at least he didn't care to have any Master appointed, you can't say that he was biased and prejudiced in refusing to do so.

Now, let's take a look at the law in the Ritter case because that's a very recent case. Even in that case, and that is if you have read it, you know that if I had been government counsel, I would have felt that I didn't have a chance of a snow storm in *Dante's Inferno*—I really would—before Ritter. Any time that any attorney raises an eyebrow at Ritter, this is what occurs: "The latter, that is Ritter, reacted in a characteristic manner that impugned his integrity and also that of an attorney for the defendant." And hold your hats because here we go again with Ritter: "And Judge Ritter was indeed

caustic and overbearing toward counsel for the government and this in part no doubt resulted in the filing of the motion demanding that he disqualify himself."

But the Court of Appeals said, "We have examined the colloquy of the judge and counsel and it cannot be said that the attitude displayed could in and of themselves demonstrate prejudice. It might be added that such displays are not infrequent or uncommon."

Well, that statement was wrong. They shouldn't be. While we do not condone them, they do not invariably evidence bias or prejudice against a party. Then they take their out. Sometimes, however, they might put the injudicious and partisan conduct at trial.

In viewing the facts in their totality, we continue to face the weak facts of presentation. There is no indication that Christensen acted unfairly or unethically; no basis to believe Judge Ritter's ruling favored the defendants. These rulings were in the court at the prior ruling which preceded the problem of the resolutions.

The only thing that was left was the attitude of Ritter for the attorneys for the government. And then after they wish-washed back and forth, they finally came out with—They don't think they'll finally disqualify, but think somebody else ought to try it.

I do not find in this case the acts and words or orders of Judge Curtis have such a nature to me to indicate that there is any bias or prejudice for or against either party here, nor that the sum totality of all that has been urged by plaintiff here is such that under the new 455(a) should call for his disqualification on the basis that his impartiality might reasonably be questioned. I do not find that plaintiff has met the burden of proof to show that in the sum total that his impartiality might reasonably be questioned.

The motion that Judge Curtis recuse himself or be disqualified, both motions are denied.

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As much as I hate to do it in my old age, I might write a decision on this, but don't hold your breath.

(Proceedings herein of this date were concluded.)

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ORDER NO. 88

**ORDER DENYING PLAINTIFF'S FURTHER RENEWED  
AND SUPPLEMENTAL MOTION FOR  
DISQUALIFICATION OF ASSIGNED JUDGE**

Filed November 14, 1977

Plaintiff's Further Renewed and Supplemental Motion for Disqualification of the Assigned Judge filed herein August 23, 1977, having been assigned to the Honorable Martin Pence, United States District Judge from the District of Hawaii sitting by designation of the Chief Judge of this district to hear and rule upon this motion, said motion having been fully argued and considered by the court,

For reasons fully set forth in the oral opinion of the court, now part of the record of this case,

IT IS HEREBY ORDERED that plaintiff's Further Renewed and Supplemental Motion for Disqualification of Assigned Judge is hereby denied.

DATED: Nov. 10, 1977

/s/ Martin Pence  
MARTIN PENCE  
United States District Judge

**CERTIFICATE OF PLAINTIFF'S COUNSEL  
MARY HELEN SEARS**

I, Mary Helen Sears, having read and considered the "Order Denying Plaintiff's Motion For Disqualification of the Assigned Judge" certify, with full cognizance of the provisions of Rule 11 of the Federal Rules of Civil Procedure, that:

1. The sentence reading

"It is apparent from the affidavits of Ms. Sears, filed in support of this and earlier motions, that she has become angry with this court because of a series of adverse rulings which apparently have frustrated her litigation strategy."

appears to me to imply that the motion for disqualification of the assigned judge was filed by reason of my anger at the rulings of such judge rather than on the basis of professional judgment that the judge should be disqualified under 28 U.S.C. § 455(a).

2. To my personal knowledge, plaintiff's motion for disqualification of the assigned judge in the subject case was not made by reason of anger or any other emotion of mine, nor for any personal reason of mine, but rather was filed quite impersonally based on the client's desire and the professional judgment of its counsel, including but not limited to me, that the motion was and is well-founded in fact and in law.

3. Any suggestion that I would or did file or that I would or did countenance the filing of a motion to dis-

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\* \* \*

qualify a federal judge on the basis of personal anger or any other emotion of my own is a false suggestion.

/s/ Mary Helen Sears  
MARY HELEN SEARS



## AFFIDAVIT OF LEON YOCHELSON

LEON YOCHELSON, being duly sworn, deposes and states:

1. I make this affidavit at the request of counsel for petitioner, Lee Pharmaceuticals, in the above-entitled proceeding.

2. I have been provided by counsel for Lee Pharmaceuticals with the following documents:

(i) a document, 62 pages in length, entitled "Petition for Extraordinary Writ Pursuant to 28 U.S.C. § 1651 and Rule 21 of the Federal Appellate Rules of Appellate Procedure". That document, as supplied to me, is included in the envelope marked Exhibit A.

(ii) a document which is entitled "Lee Pharmaceuticals v. U.S. Dist. Ct. C. D. of Cal. (Den-Mat, Inc. et al—Real Parties in Interest) EXHIBIT BOOK TO 'PETITION FOR EXTRAORDINARY WRIT', #77-1969", which document includes tabbed exhibits numbered 1 through 33. That document as supplied to me is contained in the envelope marked Exhibit B.

3. I have read the Exhibit A and Exhibit B documents which are described in paragraph 2 hereof.

4. I understand from the Exhibit A document that Lee Pharmaceuticals requests an order from this Court causing Judge Jesse W. Curtis of the United States District Court for the Central District of California to disqualify himself pursuant to 28 U.S.C. § 455(a) from sitting further in the case of *Lee Pharmaceuticals v. Den-Mat, Inc., et al*, Civil Action No. 75-2311 JWC, and prohibiting Judge Curtis from further participation in that case on the ground that his conduct since at least

about October 27, 1976 has been such that his impartiality might reasonably be questioned.

5. I have read the present statute 28 U.S.C. § 455(a) which provides:

"Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself *in any proceeding in which his impartiality might reasonably be questioned.*"

and I have noted particularly the underlined portion thereof.

6. I have read what I am informed is the prior statute 28 U.S.C. § 455 which provides:

"Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related or connected with any party or his attorney as to render it improper, *in his opinion*, for him to sit on the trial, appeal, or other proceeding therein."

and I have particularly noted the underlined portion thereof.

7. My education and experience are accurately summarized in the document marked Exhibit C and entitled "Leon Yochelson, M. D." and in the untitled document marked Exhibit D.

In addition, for at least the last 25 years, I have devoted on the order of about ten percent of my professional time to forensic psychiatric work in both civil and criminal matters, for plaintiffs and defendants and at times as an agreed-upon expert for both, in matters pending before various courts in Maryland, Virginia and the District of Columbia.

8. I have had no prior association of any kind with the petitioner Lee Pharmaceuticals or with any of its counsel.

9. I have not personally examined Judge Jesse W. Curtis.

10. In my professional opinion, the question posed by the present statute 28 U.S.C. § 455(a) of whether or not a given judge's "impartiality might reasonably be questioned" is most reliably determined by a person other than that same judge.

11. Based solely upon my review of the aforementioned Exhibit A and Exhibit B documents and having neither read nor considered any other part of the record in Civil Action No. 75-2311 JWC, it is my professional opinion that the conduct of Judge Jesse W. Curtis in Civil Action No. 75-2311 JWC is such that his impartiality might reasonably be questioned; it is my further opinion that the conduct of Judge Curtis demonstrates that he is strongly disposed against the plaintiff and its counsel.

12. In my professional opinion, based on my reading of only the papers which are Exhibits A and B, Judge Curtis has demonstrated by his conduct that he is not capable of a detached and objective determination of the question of whether his impartiality in Civil Action No. 75-2311 JWC might reasonably be questioned.

/s/ Leon Yochelson, M. D.  
LEON YOCHELSON, M. D.

DISTRICT OF COLUMBIA: ss

Subscribed and sworn to before me this 13 day of July, 1977.

/s/ [Illegible]  
Notary Public

My Commission Expires April 14, 1980.

Leon Yochelson, M.D.

DOB 7/23/17; Buffalo, New York

Married; Three children

\* \* \*

- 1938 B.A. in Psychology (Magna Cum Laude), University of Buffalo (SUNY)
- 1942 M.D., University of Buffalo (SUNY)
- 1942-3 Internship with emphasis on Psychiatry, St. Elizabeths Hospital, Washington, D.C.
- 1943 Diplomate, National Board of Medical Examiners
- 1943-6 U.S. Army: Australia, New Guinea, Philippines  
Psychiatric Ward Officer  
Psychiatric Consultant to 80th General Hospital (2000 beds)
- Rank on Discharge: Major
- 1946-8 Medical Officer in Psychiatry, St. Elizabeths Hospital, Washington, D.C.
- 1946 Licensed in Medicine and Surgery, Washington, D.C.
- 1948 Certified in Psychiatry by American Board of Psychiatry and Neurology. For a number of years was Assistant Examiner and Examiner.
- 1950 Diploma, Washington School of Psychiatry
- 1952 Graduate, Washington Psychoanalytic Institute

\* \* \*

#### TEACHING HISTORY

- 1948-64 By invitation:  
Washington School of Psychiatry (1951-62)  
Catholic University of America, School of Social Work and Department of Psychiatry and Psychology



Howard University: School of Social Work

St. John's University, Collegeville, Minnesota

Lecturer: Summer Workshops for the Clergy

University of Oklahoma Medical School—Visiting  
Professor

The George Washington University Medical Center

1949 Assistant Clinical Professor of Psychiatry:  
Chief of University Hospital Program

1955 Associate Clinical Professor of Psychiatry

1959 Professor and Chairman, Departments of Psy-  
chiatry in Medical School, University Hospital  
and Clinic

1965 Co-Director—G.W.U. Institute of Law, Psy-  
chiatry and Criminology

1970 Resigned Chairmanship of Department of Psy-  
chiatry and continued as Professor of Psychi-  
atry and Behavioral Sciences, to date

Washington Psychoanalytic Institute—Training and Su-  
pervisory Analyst, 1950-1952, 1956 to date

\* \* \*

#### PRESENT PROFESSIONAL ACTIVITIES

Chairman, Professional Associates (group practice of  
psychiatry)

Chairman, Psychiatric Institute of Washington, D.C.

Chairman, Psychiatric Institute Foundation (non-profit  
research and education)

\* \* \*

#### ORGANIZATIONS

Federation of American Hospitals  
Vice President

Chairman, Committee on Psychiatric Hospitals  
Committee on Health Associations Liaison

National Commission on Confidentiality of Health Records  
Board of Directors

Washington Psychiatric Society (charter member)

President 1964-65. Member of Council for many  
years

Fellow, American Psychiatric Association  
Chairman, Committee on Membership, 1967-70

Medical Society of the District of Columbia

Member, Medical Ethics and Judicial Committee

Past Member:

Nominating Committee

Committee on Religion and Psychiatry

Committee on Mental Health—Chairman for  
many years

American Medical Association

American Academy of Psychiatry and Law, Charter  
Member

Medical Society of St. Elizabeths Society—Past President  
American Psychoanalytic Association

International Psychoanalytic Association

Washington Psychoanalytic Society

American College of Psychiatrists, Fellow

American College of Psychoanalysts, Founding Fellow

National Association of Private Psychiatric Hospitals

Co-chairman, Committee on Proprietary Hospitals

Member, Joint Commission on Accreditation Task  
Force



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American Association for Chairman of Departments of  
Psychiatry, Past Member

American Association for the Advancement of Science

\* \* \*

#### HOSPITAL AFFILIATIONS

The George Washington University Hospital

Sibley Memorial Hospital (Honorary Consultant)

Children's Hospital National Medical Center

Doctors Hospital

\* \* \*

#### CONSULTANCIES

NIMH

Social and Rehabilitation Service of HEW

V.A.

#### PROFESSIONAL WRITING

Editor of "Symposium on Suicide"

Consulting Editor, Journal of Life Threatening Behavior

Author of chapters in three books and of a number of  
articles, published in professional journals

\* \* \*

#### HONORS

Member, Gibson Anatomical Society

Member, Alpha Omega Alpha Honor Medical Society

Certificate of Appreciation, U.S. Department of HEW

Certificate of Commendation, American Psychiatric Association

Academic Lecturer, American Psychiatric Association by  
invitation (1963)

41a

An Incorporator of:

The Joint Commission on Mental Health of Children

American Branch of the World Psychiatric Organization

Leon Yochelson, M.D., founding partner and Chairman of The Professional Associates, and the Boards of The Psychiatric Institute and The Psychiatric Institute Foundation, was Chief of Psychiatry at The George Washington University Hospital from 1949 and Chairman of The Department of Psychiatry of the School of Medicine of The George Washington University from 1959 until his resignation from both positions in 1970. He has continued as Professor of Psychiatry and Behavioral Science and as Co-director of the Institute for Law, Psychiatry and Criminology at The George Washington University.

Dr. Yochelson is Supervising and Training Analyst at The Washington Psychanalytic Institute, past-Vice Chairman of the Sub-Committee on Mental Health of The Public Health Advisory Council of The District of Columbia, an examiner in Psychiatry for The American Board of Neurology and Psychiatry, and post-Chairman for many years of the Committee on Mental Health of the Medical Society of the District of Columbia and is presently a member of the Medical Society's Committee on Ethics. He has also been a psychiatric consultant to the National Institute of Mental Health, the Office of Vocational Rehabilitation of the Department of Health, Education and Welfare and The Social Security and Veterans Administrations. He is a Fellow of The American Psychiatric Association and past-Chairman of its Membership Committee. He is a Fellow of the American College of Psychiatrists and a Founding Fellow of the American College of Psychoanalysts. He is past president of the Washington Psychiatric Society and a member of the Washington Psychoanalytic Society.

Presently Dr. Yochelson is a Vice President of the Federation of American Hospitals and Chairman of its Committee on Psychiatric Hospitals. He is also a member of the Board of Directors of the National Commission on Confidentiality of Health Records.

**EXCERPT FROM  
PETITION FOR WRIT OF MANDAMUS 77-3361**

**Filed October 11, 1977**

[Commencing at p. 18, l. 4]

\* \* \*

The March 4 and August 22, 1977 motions—contrary to what appears from actually reading them—were classed by Judge Pence as motions to reconsider the February 11 motion and disposed of adversely to petitioner as if one with that February 11 motion (Ex.Bk., Tab 1, p. 98, l.13—p. 99, l. 20). Had Judge Pence troubled to read either of them, as he obviously did not, he would have seen that each satisfies his expressed criterion for a *proper* further motion, i.e., "something new . . . that you didn't have before" (*Id.*, p. 99 ll. 15-16) and *neither* constitutes "a second and third guess to keep on it because you happen to think about it afterwards" (*Id.*, p. 99, ll. 19-20) as inaccurately and unfairly charged. Pointedly, (a) the February 11 motion (Ex.Bk., Tab 4) relates to facts demonstrating appearance of partiality before its date; (b) the March 4 "supplemental and renewed" motion (Ex. Bk., Tab 6) relates to new facts arising *after* February 11 and includes papers refuting the *false accusation* concerning motivation for that motion first made by Judge Curtis in his February 18 denial (Ex.Bk., Tab 5) of the February 11 motion<sup>22</sup> and (c) the August 22 motion (Ex.Bk., Tab 19) expressly *only* relates to *new facts occurring after* March 8.

Since Judge Pence obviously *did not* read these motions, he *did not*, in his oral opinion, comment upon any of the factual bases for disqualification under 28 U.S.C. 455(a) that each presents. Moreover, he apparently failed to

<sup>22</sup> These papers are the Sears certificate and the Lee affidavit. There is simply *no way* in which petitioner, lacking occult powers as it and its counsel are, *could* have been aware of any need for either until Judge Curtis' Order No. 48 (Ex.Bk., Tab 5) was received.



appreciate the significance of—and likewise did not comment upon—the highlights of each as exposed by petitioner's counsel earlier in the oral hearing (Ex.Bk. Tab 1, pp. 171).

In consequence, Judge Pence did not really weigh *at least* the following facts in considering whether Judge Curtis is obligated to disqualify himself under 28 U.S.C. 455(a):

(a) The indicia of emotional personal involvement and personal rancor of Judge Curtis in Civil Action 75-2311 JWC that are manifest on the face of the "Order re Plaintiff's Motion for Disclosure of All Off-the-Record Communications between Court Personnel and Defendants, the Representatives and Counsel" (Ex.Bk., Tab 21) entered February 15, 1977—hence four days *after* the filing of the original disqualification motion—including at least:

(i) its charges that a proper and respectful *inquiry* about the judge's off-the-record communications and relationships were "implications" of misconduct and "claims" of an "outrageous" nature;

(ii) the characterization of this inquiry as "contemptuous", "frivolous and impertinent" conduct by petitioner's counsel;

(iii) the attempted deprecation of petitioner's concern about possible serious improprieties on the part of the Court and its staff, which led to the criticized inquiry, to the level of "petty personal bickering" relating only to "collateral and irrelevant matters"—which, *a fortiori*, suggests a total insensitivity of Judge Curtis toward every litigant's *right* to "A fair trial in a fair tribunal . . . a basic requirement of due

process. . . .". *In re Murchison*, 349 U.S. 133, 136 (1955).<sup>26</sup>

(iv) the mischaracterization of the law clerk Holliday's affidavit as indicating that the latter's *ex parte* contacts on behalf of Judge Curtis with defendants related only to procedural and informational matters when, in fact, the affidavit confesses one conversation with defendants' counsel concerning the controverted issue of how trade secret issues were to be handled.<sup>27</sup> The

<sup>26</sup> Manifestly, litigants are not required to *assume* that the tribunal is fair and will give a fair trial, especially in face of objective contrary indicia.

*If* Judge Curtis *were* wholly impartial, and *if* he and his law clerk had committed no impropriety, wouldn't he have courteously revealed exactly what occurred in various *ex parte* contacts with defendants, *inter alia* by making his law clerk available to answer questions? Can any objective observer believe that a truly detached and impartial judge would vilify inquiring counsel, dub their inquiry "irrelevant" and "petty" and supply only a *partial* self-serving affidavit answer?

Note also that Judge Curtis had earlier demonstrated his disregard for fair trial and due process of law by simply casting aside established procedures mandated by the Federal Rules of Civil Procedure in favor of *his own* "unusual and innovative procedures". See Ex.Bk., Tab 71.

<sup>27</sup> The Code of Judicial Conduct, Canon 3A4 provides that:

"A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond."

Thode, "Reporter's Notes to Code of Judicial Conduct" (1973) clearly states:

". . . The drafting of the appropriate standard regulating *ex parte* communications proved to be difficult. *In an adversary proceeding, ex parte communications by the judge to a party or*

order appears to attempt to mislead, *e.g.*, an appellate court reviewing the matter, as well as to camouflage the acknowledged impropriety.

(b) Indicia of emotionalism, personal involvement and rancor on the part of Judge Curtis which are implicit in the false charge against Miss Sears which the judge made a part of his "Order Denying Plaintiff's Motion for Disqualification of the Assigned Judge, dated February 17, 1977 (Ex.Bk., Tab 5)—six days after the original motion was filed. Thus, to avoid any reasoned consideration of the motion,

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*his lawyer or by a party or his lawyer to the judge clearly should be precluded.* The more difficult questions concerned such transactions as a telephone call by the judge to a law professor to obtain advice on a contested issue within the area of the professor's expertise, or consultation by the judge with another judge not on the same panel or the same court. These are not infrequent or hypothetical situations—the Committee was informed of many such communications. See the discussion of the controversy between Judges Frank and Clark over these very issues in the recent book by Marvin Schick, *Learned Hand's Court* (The Johns Hopkins Press, 1970), and Schick's article, *Judicial Relations on the Second Circuit, 1941-1951*, 44 N.Y.U.L. Rev. 938, 941-947 (1969). The Committee concluded that unless the *ex parte* communication is authorized by law—statute, common law, and rule being the principal methods of authorization—the communication should be prohibited. Communications between judges and between the judge and court personnel whose function is to aid the judge in carrying out his adjudicative duties were recognized by the Committee as falling within the 'authorized by law' provision. A judge receiving a communication about a proceeding that is not before him should, however, be aware that if the proceeding does come before him in the future, any present communication about the proceeding might require his disqualification at that future point by reason of Canon 3C(1), which provides: 'A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned . . .' A judge who has theretofore given advice about the issues in a proceeding has put his impartiality in jeopardy." (Emphasis supplied)

The type of *ex parte* communication that occurred here, which Judge Curtis order attempts to cover up by mischaracterizing the Holliday affidavit, was *clearly intended* to be ethically precluded.

Judge Curtis lashed out at Miss Sears, charging that she filed the original motion in bad faith and solely because she had become "angry" at frustration of her litigation strategy."

(c) Indicia of lack of impartiality that are implicit in Judge Curtis' "Order Denying Plaintiff's [sic Motion for Retraction and Expungement" dated February 15, 1977 (Ex.Bk., Tab 22). The motion disposed of by this order, filed by counsel on February 3, 1977 (Ex.Bk., Tab 23), asks Judge Curtis, consistent with his desire expressed at the January 10, 1977 hearing "to dispel any feeling that you may have that this Court has any reluctance to decide anything in favor of the plaintiff" <sup>28</sup> (Tr. 42, 11. 1-3), to retract and expunge certain specifically identified

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<sup>28</sup> This false, fabricated charge which has never been withdrawn, exemplifies the degree to which Judge Curtis consistently ignores and departs from Canon 3A3's requirement that "A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers and others with whom he deals in his official capacity. . . ."

The charge is in any event petty and unworthy of any mature adult, much less a federal judge. Experienced lawyers are accustomed to receiving both favorable and unfavorable pretrial motion decisions and do not become "angry" with courts because of such decisions. Any experienced lawyer, however, would be professionally concerned about the apparent improprieties on the part of the court in this case, that create the appearance of partiality such as the *ex parte* discussion by the law clerk of controverted issues with one side, scuttling of the Federal Rules of Civil Procedure and the apparent failure of the Court to base its decisions on the facts which *actually* appear on the record. Such is not, however, a matter of *personal* feeling on the part of any responsible, mature lawyer—and the accusation to the contrary degrades the judicial process, the judiciary and the legal profession to the detriment of the civilized rule of law.

<sup>29</sup> That Judge Curtis should have been concerned about dispelling "feeling" of the sort he defined is somewhat remarkable. Plaintiff had not articulated any such feeling to that time. The quoted statement, in all the circumstances, is a clear indication that Judge Curtis *knew* he had appeared up to that time to be disposed *against* plaintiff in derogation of 28 U.S.C. 455(a).



oral comments that reflect adversely upon the good faith and competence of petitioner and upon the competence of its counsel. Defendants opposed in a paper filed February 11, 1977 (Ex.Bk., Tab 24). Petitioner's reply brief (Ex.Bk., Tab 24-A) under local rules was due February 17, 1977 when it was, in fact, filed and was served by mail February 15, 1977 from Washington, D.C. Without even awaiting that brief, Judge Curtis, on February 15, reacted, obviously with emotion and rancor, to sign an order denying the motion and to demonstrate that his desire to "dispel" petitioner's feelings, if any, that he might be reluctant to decide in its favor was at best shallow.

(d) Judge Curtis' conduct in refusing to strike or enter sanctions against the false and reckless charge that in producing documents "plaintiff or its counsel . . . literally took and tore apart documents". (Ex.Bk., Tab 25, p.2) also gives the appearance of partiality. Defendants recognized "the gravity of" their charge (*ibid.*) but alleged that "irrefutable proof" was demonstrated by the words "tear apart" appearing on two pages. Plaintiff, on or about February 3, 1977, filed a motion to strike these charges and for sanctions accompanied by a personal knowledge affidavit of its president, Henry L. Lee, Jr. that the words "tear apart" refer to a practice at plaintiff's predecessor of taking one copy of all research reports apart by subject matter for filing in separate subject matter files and that there was no document tampering in connection with producing documents in the litigation.<sup>30</sup> Defendants' opposition does not even attempt to refute these facts but raises a plurality of new points never before urged, based on an attached affidavit of their coun-

<sup>30</sup> The motion and all supporting papers appear at Ex.Bk., Tab 26.

sel, Arthur Martin, who was *not* present at the document production and inspection, and has no personal knowledge thereof.<sup>31</sup> Without benefit of petitioner's timely served and mailed reply brief (Ex.Bk., Tab 28) the judge entered an order (Ex. Bk., Tab 29) denying the motion and thus signified that he did not believe the Lee affidavit but *did* believe defendants' reckless and false charges.<sup>32</sup>

(e) The various facts set forth in the affidavit of petitioner's president, Henry L. Lee, Jr., executed March 4, 1977 (Ex.Bk., Tab 6) which demonstrate the feelings of apprehension that Judge Curtis' conduct aroused in Mr. Lee as to his bias against the plaintiff and the improbability—if not impossibility—of fair hearing on plaintiff's case before Judge Curtis.<sup>33</sup>

(f) The indicia of insensitivity to truth, emotional rancor against petitioner and its counsel and abnormal personal concern for preserving his continued right to sit in Civil Action 75-2311 implicit or explicit in at least the following post-March 8, 1977 events and occurrences:

<sup>31</sup> These papers appear at Ex.Bk., Tab 27.

<sup>32</sup> Defendants' opposition was served by mail and filed on February 15, 1977, having been served by mail on February 11, 1977. Under apposite local rules, petitioner's reply was due February 18, 1977 and was mailed on February 15 and filed February 18. The denial order however is dated February 17.

<sup>33</sup> Some of these facts are repetitive of those raised in petitioner's February 11, 1977 and March 4, 1977 memoranda on disqualification; others are not. All are presented in the context of Mr. Lee's view of matters as officer and director of the petitioner corporation.

Importantly, in view of the colloquy at the hearing before Judge Pence (Ex.Bk., Tab 1, p. 55, l. 25 to p. 57, l. 12) it is emphasized that Mr. Lee personally directed the *content*, albeit not all of the language, of his affidavit and stands ready to be cross-examined on his beliefs and impressions there recorded, and the manner in which they are recorded, should the Court so desire.

(i) On two occasions Judge Curtis incorrectly stated in substance that the only basis for disqualification advanced by petitioner was the fact that he had made motion rulings adverse to plaintiff—to wit, in the Memorandum to Chief Judge Stephens (Ex.Bk., Tab 14) and in Order No. 84, entered August 15, 1977 (Ex.Bk., Tab 30). As the various supporting papers clearly show and as even Judge Pence seemingly acknowledged (Ex. Bk., Tab 1, p. 73, l. 19 to p. 74, l. 7) the motions to disqualify do *not* rest on motion rulings but upon Judge Curtis' manner of making such rulings, and his attitude toward petitioner and its counsel.<sup>34</sup>

This effort by Judge Curtis to distort the record and promote a result whereby he continues to sit clearly demonstrates his unseemly *personal* attachment to the case and his determination to insure that *he* masterminds its outcome.<sup>35</sup>

<sup>34</sup> It is petitioner's position that—disregarding altogether the outcome of the motion rulings—the record shows a series of occurrences which, taken singly or together, demonstrate that Judge Curtis has such an insensitivity toward truth, ethics and simple fairness, such an inability to behave in a calm, detached, impersonal and impartial manner, such a marked disposition to treat petitioner and its counsel with discourtesy, impatience, skepticism and personal emotion and such lack of respect for established procedures and usages of law, including both federal and local rules of procedure that he is obligated to disqualify himself under 28 U.S.C. 455(a).

See the discussion of precedent which recognizes this as a *proper* basis for disqualification under § 455(a) under Reason 1, *infra* p. 58, and note that the essential purpose of the statute is to increase public confidence in the integrity and impartiality of the judiciary so that *all* litigants will feel that they are receiving justice in the courts.

In this case, petitioner already *knows* that there is *no way* in which it could under *any* circumstances, receive a fair hearing at the hands of Judge Curtis.

<sup>35</sup> Would not an impartial and fair judge acknowledge and face squarely up to the *real* reasons advanced for his disqualification?

(ii) On March 29, 1977, Judge Curtis denied an unopposed motion by plaintiff's counsel to strike a charge of "contemptuous" conduct or alternatively hold a contempt hearing under Federal Rule of Criminal Procedures 42(b).<sup>36</sup>

The *merit* or *demerit* of this order is the subject of Appeal No. 77-2054, now pending in this Court. The language of the order, however, including its repetition of a charge of "frivolous, contemptuous and impertinent" conducted by petitioner's counsel, its new charge that Miss Sears acted in a "clearly contemptuous" manner and its concomitant sophistry that a contempt hearing would be inappropriate because "plaintiff's attorney has not been charged with contempt" are all indicative of Judge Curtis' inability, due to the degree of personal involvement he has allowed himself therein, to render any fair and impartial decision on *any* subsequent phase of Civil Action 75-2311 or to treat petitioner's counsel, in the "patient, dignified and courteous" manner required by the Code of Judicial Conduct.

(iii) This inability is further pointed up by the post-March 8, 1977 occurrences relating to pending Appeal 77-1984. This collateral appeal by plaintiff's counsel from an order imposing a \$1,200 fine (Ex.Bk., Tab 33) on plaintiff's counsel challenges the *merit* of the order. Judge Curtis, however, even while acknowledging that the appeal is properly taken and a matter of right, refused to stay payment of the fine (Ex. Bk., Tab 34), refused to set a supersedeas bond (Ex.Bk., Tab 35) and did so reluctantly and

<sup>36</sup> The order appears at Ex. Bk., Tab 31; the motion and supporting papers at Ex. Bk., Tab 32.



grudgingly only after this Court strongly suggested in response to a motion filed here by the appellant counsel, that he do so. In his order setting the supersedeas (Ex.Bk., Tab 35)—in an amount *double* the fine—Judge Curtis again reveals his emotional and rancorous disposition *against* petitioner and its counsel by slurring their good faith and competence. Thus, Judge Curtis accuses such counsel by innuendo of inducing *this* Court to prod him into granting supersedeas by concealing his Order No. 64 (Ex. Bk., Tab 35) from it—an egregious and false accusation.<sup>37</sup> Secondly, Judge Curtis unnecessarily expresses, in a blatant effort to prejudice the appellants in this Court, notwithstanding their irrelevance to the matter before him, his own unsolicited opinions,

(1) that although the order appealed from (Ex.Bk., Tab 33) was posited solely and deliberately on Local Rule 3(k), "Local Rule 3(i) was equally applicable"—a statement seemingly calculated not only to prejudice appellants in this Court's eyes, but to influence and strengthen defendants' briefing on appeal;<sup>38</sup>

<sup>37</sup> The innuendo is, specifically,

"the circuit court's order makes no reference to this court's Order No. 64, filed May 4, 1977. It is unclear whether the circuit was aware of this order when it remanded the case."

Whether Judge Curtis *knew* this implicit accusation to be false is uncertain and petitioner does not represent that he *did* actually know it. Petitioner's point is that an impartial judge—and one conscious of his ethical duty under Canon 3 A 4—would *not* have recklessly made the charge.

<sup>38</sup> Actually defendants' initial invitation to rely on Local Rule 3(i) was *rejected* in the order appealed from, so that defendants must be presumed clearly aware of the rule in any case—with the obvious

(2) that the \$2400 amount of the supersedeas is based on "plaintiff's litigious propensities"—an uncalled for and unexplained implication that the bounds of proper advocacy have somehow been overstepped, clearly intended to prejudice appellants in this Court;<sup>39</sup>

(3) that "in this court's view . . . the appeal is frivolous and . . . filed for the purpose of thwarting this court's efforts to move this case toward its ultimate determination with a minimum of delays and unnecessary procedures"—an almost irrationally emotionally charge which necessarily betrays the fact that Judge Curtis' state of mind is such as to create an untoward appearance of partiality. Thus, there is *no way* in which grant of supersedeas in No. 77-1969, a collateral appeal, *could* or *would* delay No. 75-2311 below and hence the appeal *could not possibly* have such a "purpose". Any calm and detached judge would surely so realize and would not have advanced such a baseless and unreasoned charge.<sup>40</sup>

inference being that the judge sought mainly to influence this Court unfairly and to express his emotional sympathy for defendants.

<sup>39</sup> Any fair review of the *whole* record would show defendants to be at least equally, if not more "litigious" than plaintiff—and it is, after all, a trial lawyer's job to be "litigious" in presenting his client's proper case. Such is, indeed, the very essence of the adversary process—and it becomes particularly incumbent upon *counsel* to insure that a client is not victimized by rulings that are contrary to fact or law or both, are arbitrary or unfair, or otherwise improper, where the judge appears less than detached and impartial.

<sup>40</sup> It is also significant that the case is woefully *unready* for "ultimate determination" on *any* issue and will remain so, just as long as Judge Curtis persists in denying both sides an opportunity

(iv) On April 22, 1977, Judge Curtis entered Order No. 56 "denying plaintiff's motion to preclude voluntary in camera submissions to the court" (Ex.Bk., Tab 37). The denial states:

"This motion is improper, for the issue of propriety of submitting documents to the court for in camera submission can only arise as a part of the court's consideration of demands for specific documents and objections thereto. This motion standing by itself makes no sense."

This adverse reflection upon the good faith and competence of plaintiff's counsel is unmerited. Regardless of whether the motion *per se* should have been granted or denied, there *was* good ground for seeking a ruling as the plaintiff's moving papers (Ex.Bk., Tab 38) clearly show. Pointedly, defendants had earlier flatly threatened in their "objection to plaintiff's various discovery requests" (Ex.Bk., Tab 39) that "Defendants will not produce to plaintiff or its counsel" certain documents, but "Rather . . . will make an *in camera* submission to the Court". The motion on its face sought to fore-

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to pursue proper discovery on the basis of "unusual and innovative" abrogation of *all* the discovery rules. A full year has now ensued with no meaningful progress whatever toward "ultimate determination", in preponderant part attributable to the continued discovery freeze and the inability or unwillingness, as the case may be, of Judge Curtis to exercise proper supervision over the few inadequate discovery attempts he *has* permitted.

Plaintiff is *at least* as eager as defendants or Judge Curtis, and probably far more so than either of them, to move the litigation forward to a *fair* trial before a *fair* tribunal. The fact is, however, that *no possibility* of such a fair trial exists so long as Judge Curtis continues to preside—or his unorthodox procedures *de hors* the rules continue to be followed.

stall this activity and was neither improper nor nonsensical, as charged.<sup>41</sup>

(v) In Order No. 58 (Ex.Bk., Tab 40), Judge Curtis attacked plaintiff's motion to compel production of documents as to which defendants claimed a "work product" privilege under certain classifications WP-3 and WP-4<sup>42</sup> as "totally improper and a flagrant violation of Local Rule 3(k)" because he had already entered Order No. 51 (Ex.Bk., Tab 41) denying production of the same documents. But the motion (Ex.Bk., Tab 42) attempts to call attention to and refute errors of law first manifested in Order No. 51 and hence could not have been brought until after entry of the latter—and the testy reflection upon petitioner's counsel's good faith and competence is unwarranted and unnecessary to the ruling.

(vi) In contrast, Order No. 60 (Ex.Bk., Tab 43), *grants* the defendants' May 2, 1977 oral request (Ex.Bk., Tab 44, p. 42, 11, 21-23) for reconsideration and vacation of those aspects of the November 2, 1976 order (Ex.Bk., Tab 45) that require defendants to respond to certain of petitioner's discovery requests. Conspicuously, however, Order No. 60 does not refer to defend-

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<sup>41</sup> Even if this attack upon plaintiff and its counsel *could* be attributed to carelessness, inattention or overwork, rather than rancor and malevolence, it certainly demonstrates that Judge Curtis' "impartiality might reasonably be questioned" (28 U.S.C. 455(a)) by anyone observing his conduct and hence that he *should* disqualify himself.

<sup>42</sup> These classifications refer to defendants' counsel's communications to and from neutral third party entities such as clerks of courts, counsel who have opposed plaintiff's counsel Irons & Sears in other cases, libraries, government agencies and the like. The whole matter, like others of the matters discussed under this heading, was argued to Judge Pence (Ex.Bk., Tab 1 p. 39, 1. 23 to p. 43, 1. 3) but ignored in his bench opinion.



ants' rehearing request or to defendants' failure to comply with Local Rule 3(k) in making it, and thus constitutes further factual demonstration of Judge Curtis' double standard approach which creates *at least an appearance* of partiality.<sup>43</sup>

(vii) Order No. 66 (Ex.Bk., Tab 46) vacates Order No. 59 (Ex.Bk., Tab 47) because petitioner "objected specifically to the appointment of Elwood S. Kendrick". The implication is that the objection was obstructive or obstreperous. In fact, Judge Curtis had *no* choice but to excuse Mr. Kendrick, with or without objection, in view of the facts first revealed to petitioner by the court and defendants on May 2, 1977 (Ex.Bk., Tab 44, pp. 4-8) and (1) his daughter is employed by defendants' counsel Furth, Fahrner and Wong—making disqualification of Mr. Kendrick mandatory and nonwaivable under 28 U.S.C. 455(b)(5)(ii) and (iii) and (2) he himself currently acts as co-counsel with Mr. Furth in several class actions in which his specific clients are on the same side as Mr. Furth's—making his disqualification under 28 U.S.C. 455(a) appropriate, and, albeit theoretically

<sup>43</sup> One effect of Order No. 60 which Judge Curtis *must* have recognized, based on Ex.Bk., Tab 44, pp. 44-47, was to vacate without cause all of the third party subpoenas and deposition notices petitioner had been forced to file to obtain the WP-3 and WP-4 documents in third party hands and hence to preclude access of petitioner thereto. Since petitioner's counsel had undertaken *not* to appear in person and *not* to have the witnesses questioned, but only to procure the documents, defendants could not have been even slightly inconvenienced if these proceedings had gone forward. Judge Curtis *knew* this also (Ex.Bk., Tab 44, p. 46, 11. 8-22). The only reasonable inference is that he *wanted* to prevent petitioner's access to these unprivileged documents—and there can be *no reasonable explanation* for such a desire except malice toward petitioner or partiality toward defendants.

waivable under 28 U.S.C. 455(e), actually and ethically nonwaivable because of the most recent amendment by the Judicial Conference of the United States to Canon 3D of the Code of Judicial Conduct.<sup>44</sup>

(viii) Order No. 72, filed May 26, 1977 (Ex. Bk., Tab 48) demonstrates a disposition against petitioner of long duration. It premises its ruling at least partially upon an assertion that in a recently filed pleading "plaintiff *now* contends that defendants have already been supplied with the details of the claimed trade secrets and all supporting documents. (Emphasis added). In fact, petitioner *first* so contended on September 24, 1976 (Ex.Bk., Tab 49, p. 34, especially note 10) and repeated this contention whenever it got an opportunity, including in at least its motion to reconsider (Ex.Bk., Tab 50), the October 27, 1976 "Order Re Trade Secret Discovery" (Ex.Bk., Tab 51), its counsel's November 11, 1976 letter (Ex.Bk., Tab 52) seeking a hearing, and its original disqualification motion (Ex.Bk., Tab 4, p. 27 of supporting memo). Judge Curtis' belated acknowledgement of this frequently voiced contention is either an indication that he did not read petitioner's many earlier papers and has been whistling in the dark for many months to petitioner's detriment, or else that he *deliberately* avoided acknowledging what he knew to be the fact for many

<sup>44</sup> A disinterested observer would surely question in the circumstances why Judge Curtis adverted in Order No. 66 to petitioner's proper, but immaterial, objection at all under these circumstances, much less gave it as the *reason* for vacating the appointment. Petitioner is unable to offer a suggested answer other than Judge Curtis' pronounced rancor toward petitioner which prompts him to endeavor to make it and its counsel *look* bad at all times.



months because it was inconsistent with his own preconceptions. Either way, he *appears* lacking in impartiality as a result. This incorrect statement creating a false impression is repeated in Order No. 80 (Ex.Bk., Tab 53) which also charges falsely that petitioner "thwarted every effort of the Court"<sup>45</sup> to obtain a disclosure of its trade secrets. Petitioner in its "Motion in Response to Order No. 81" (Ex.Bk., Tab 55, Mot. p. 4, par. f) asked that the court supply evidence to support these findings or strike them. In Order No. 83 (Ex.Bk., Tab 56) Judge Curtis *ignored* and hence *sub silentio* denied, this request—thereby again showing both his disposition against plaintiff and that it is so intense that he would rather leave untruths standing in derogation, *inter alia*, of his judicial oath (28 U.S.C. 453) and at least Canons 2A and 3 of the Judicial Code, than apologize, confess error or otherwise run the risk of humiliating himself in any way.

(ix) In Order No. 74 (Ex.Bk., Tab 56) he charged petitioner with being "largely responsible for" a certain "six day delay" in the teeth of papers *then* before him (Ex.Bk., Tab 57) which show that:

<sup>45</sup> Order No. 66, filed May 12, 1977 (Ex.Bk., Tab 46), is the *first* effort ever made. It was replaced by Order No. 72 (Ex.Bk., Tab 48) and the latter, in its turn, was extended by Order No. 80 (Ex.Bk., Tab 53) with which petitioner timely complied. The *only* opportunity Judge Curtis had to make such an "effort" at an earlier date was *rejected* by his denial of defendants' September 1976 Rule 37 motion in an order dated November 2, 1976 (Ex.Bk., Tab 54). From that date until the abortive appointment of Mr. Kendrick in Order No. 59 (Ex.Bk., Tab 47) Judge Curtis *made no efforts* of any kind concerning the disclosure of trade secrets. His charge that petitioner "thwarted" his non-existent efforts again indicates his animus.

(1) Order No. 63 (Ex.Bk., Tab 58) requires defendants to "file and serve" certain information "within two weeks" of its date.

(2) In lieu of compliance, defendants' counsel Martin advised that documents containing the information would be available for inspection in his San Francisco office on May 16, 1977. To avoid a special, inconvenient and expensive trip to California, petitioner's counsel asked on May 10, 1977 that the documents be copied forthwith and forwarded to them in Washington, D.C.

(3) In lieu of compliance with the request, defendants' counsel started an extraneous controversy about whether the cost of copying should be 10 or 15 cents per page and did so—not by informal telephone call or letter—but by formal pleading mailed May 16 and received in Washington, D.C. on May 19, 1977. *Defendants' counsel thus deliberately delayed past the May 17 deadline.*

(4) Plaintiff's counsel acceded by telephone on May 20, to the defendants' insistence on a 15 cent per page rate—as they would have done much earlier if *then* advised of defendants' demand. The documents essential to petitioner's compliance with Order No. 63 were hence received six days late, necessitating the extension of time which Order No. 74 grants,<sup>47</sup> while

<sup>47</sup> In *this* instance, in other words, the ruling was not "adverse" but favorable to petitioner—yet Judge Curtis clearly demonstrated his disposition *against* plaintiff.

unfairly and incorrectly criticizing petitioner for the delay.

(x) Order No. 75 (Ex.Bk., Tab 59) entered June 2, 1977 asserts:

"It is only under unusual circumstances that this court would deny a party the right to be heard orally on motions of this kind. There are, however, unusual circumstances in this case. In this court's view, this motion has been filed for the sole purpose of disrupting this court's efforts to move this case along toward some ultimate conclusion. This court is fully informed as to all the matters set forth in the motion, and oral argument would be neither necessary nor helpful."

The *assumption* that petitioner and its counsel acted in bad faith in filing the motion is symptomatic of Judge Curtis' bile. An objective look at the record by a competent, fair and unbiased tribunal, will show further that Judge Curtis has made *no* meaningful efforts "to move" Civil Action 75-2311 toward a *fair* and proper "ultimate conclusion". Discovery has been frozen since December 17, 1975 (Ex.Bk., Tab 60), five months after the original complaint was filed—a remarkable circumstance in a case involving at latest count 3 patents, 5 trademarks and 18 trade secrets, plus various allegations re unfair competition, antitrust violations, etc., some not pleaded until after the freeze was imposed—and has since been permitted only with leave of court which has been grudgingly and exceedingly sparingly granted.<sup>48</sup>

<sup>48</sup> The existence of the freeze has been reiterated many times including in orders dated January 12, 1976 (Ex.Bk., Tab 61), Nov. 1, 1976 (Ex.Bk., Tab 54) and May 2, 1976 (Ex.Bk., Tab 43).

As a result there has been virtually *no* discovery since December 17, 1975 and *petitioner*, at least, is far from ready for trial.<sup>49</sup> Moreover, Judge Curtis seems determined to avoid trial and to dispose of Civil Action 75-2311 in some unorthodox summary fashion, as evidenced, *inter alia*, by his virtual direction in Order No. 60 (Ex.Bk., Tab 43) that defendants attack petitioner's patents on summary judgment even though discovery is far from complete.<sup>50</sup> In short, the implication that there is some realistic possibility of impending "ultimate conclusion" is itself a false pretense which colors the record in a way that reflects badly on petitioner.

(ix) Order No. 81 (Ex.Bk., Tab 63) departs from the procedures postulated by Order No. 60 (Ex.Bk., Tab 43) in that it grants a motion by defendants to reconsider the obligation to file a statement of their trade practices<sup>51</sup> imposed by Order No. 80 (Ex.Bk., Tab 53) *without* affording petitioner an opportunity to be heard and places petitioner under an order to show cause within one week why any further information as to such trade practices "is needed", and the

<sup>49</sup> It is doubtful that defendants are, or could be, anywhere near ready for trial either—but equally doubtful they will so admit, since retention of Judge Curtis is essential to defendants' preservation of the unprecedented procedural advantages he has bestowed upon defendants to petitioner's detriment. Indeed, it seems certain that, even proceeding on a totally unready basis, defendants could be confident that any "ultimate conclusion" Judge Curtis engineered or masterminded would be in their favor.

<sup>50</sup> Despite first representing such a motion would be filed "about six weeks" from May 2 (Ex.Bk., Tab 44, p. 42, 11. 10-13) and later by August 1 (Ex.Bk., Tab 62), defendants have yet to produce any such thing. Judge Curtis, however, has offered no criticism of defendants on this or any other point.

<sup>51</sup> The motion and supporting papers appear at Ex.Bk., Tab 64.



reason why plaintiff's statement of trade secrets "should not now be released to defendants' counsel". Here again, the double standard which implies at least the *appearance* of partiality on Judge Curtis' part was clearly in effect. Defendants' excuse for not filing a trade practices statement—as set forth in the testimonial affidavit of their counsel Arthur Martin, filed in violation of DR 5-101 and 5-102—asserts that defendants produced all relevant documents and that they fully describe defendants' trade practices.

As shown in petitioner's papers "in response to Order No. 81" (Ex.Bk., Tab 55), the truth of this affidavit is highly suspect, since (1) its claim of full document production is inconsistent with defendants' vigorous objection to such full production in the trade practices area (e.g. Ex.Bk., Tab 44, p. 26, l. 21-p. 27, l. 3) and subsequent "interpretation of Order No. 63" (Ex.Bk., Tab 65) that certain of such documents need *not* be produced (Ex.Bk., Tab 66); (2) the documents themselves do not render it clear whether or not full production has been made so that petitioner *should* be afforded the statement by defendants required in Order No. 80 and discovery in order to get at the true facts; (3) the affidavit is demonstrably false and misleading in its use of artificially truncated quotations from prior statements of petitioner's counsel to trump up a false charge that such counsel misled the district court, and (4) petitioner has *no reason*, based on facts that *are* known, even to believe that defendants' trade practices are *all* contained in documents.

Judge Curtis effectively paid little or no attention to petitioner's response (Ex.Bk., Tab 55) to

his show cause order (Ex.Bk., Tab 63). In his Order No. 83 (Ex.Bk., Tab 67) he asserted that:

"Plaintiff filed a 'Motion in response to Order No. 81' on July 20, 1977. This motion largely fails to respond to the relevant issues. Plaintiff challenges several portions of the Martin affidavit which were irrelevant to the question of the trade processes."<sup>52</sup> Plaintiff also makes the point that the court has not permitted full discovery on all of the trade secret issues and that some of the documents identified in the affidavit were not produced in response to a trade secret discovery request.<sup>53</sup> These points are simply irrelevant. The only question is whether plaintiff actually has the documents specified by Mr. Martin; how plaintiff got them is

<sup>52</sup> This separation of the Martin affidavit into "portions", with the obvious purpose of *saving* the bits relied upon by Judge Curtis, is so contrary to the established principles and usages of law and equity as to raise a reasonable question as to his impartiality—the more so in face of the record as herein discussed which demonstrates that Judge Curtis is not given to leaning over backwards, as he obviously did in this instance, to take a generous, or even charitable, view of any request *by petitioner* for relief.

<sup>53</sup> This is a distortion of petitioner's points, which were that (a) it should not be relegated to the challenged Martin affidavit but should *now* be permitted discovery on the completeness of the document production and (b) whether "some of the documents [categorically] identified in the affidavit" have been produced at all is a matter of serious question, particularly in view of defendants' position paper on Order No. 63 (Ex.Bk., Tab 66).

The distortion at least raises a question as to Judge Curtis' impartiality, since he could *not* without such an intentional distortion, have conveniently concluded, as he did, that "plaintiff has not contended that the specified documents are not in their possession, or that they do not contain the information Mr. Martin claims they do" but would have *had* to recognize that plaintiff-petitioner did raise a *serious question* tantamount to challenging both contentions.



without significance.<sup>54</sup> It is also irrelevant whether plaintiff has every shred of paper in defendants' possession which refers to any trade process.<sup>55</sup> Defendants' counsel has stated under oath that every trade process is fully disclosed in the documents that have been produced."

(xii) Order No. 83 (Ex.Bk., Tab 67) postulated a procedure for hearing and determining petitioner's April 7, 1976 preliminary injunction application wholly at variance with the motion for evidentiary hearing to which that application was attached.<sup>56</sup> Petitioner concluded that under the strictures imposed by the protective order entered September 8, 1975 (Ex.Bk., Tab 69) and the factual setting of the issues it would not have a fair chance to present its case for a preliminary injunction using the procedure Judge Curtis defined in Order No. 83. Accordingly, it

<sup>54</sup> Plaintiff, of course, did not raise an issue of "how" it got the documents in issue; its moving papers seriously questioned "whether" it had been given *all* pertinent documents. Again, the seemingly intentional distortion is significant because it symptomizes at least an *appearance* of partiality on the part of the judge.

<sup>55</sup> This conclusion of irrelevancy is necessarily based on the next succeeding sentence which accepts the "relevant" Martin affidavit averments as true, even though "irrelevant" challenged portions of the same affidavit were shown to be false. Such convoluted mental manipulations are not rationally explainable except in the context of an appearance of partiality. Absent partiality, why would a judge strain to reach an illogical result or to so distort petitioner's papers (Ex.Bk., Tab 55) as to force them to coexist with that illogical result?

Moreover, the contrast between Judge Curtis' reluctance to question the Martin affidavit, notwithstanding petitioner's demonstration of the falsity of some statements therein and his unwillingness to accept *any* fact statement, sworn or unsworn, proffered by plaintiff is striking—and *per se* creates an appearance of partiality.

<sup>56</sup> The whole package as filed appears at Ex.Bk., Tab 68.

filed a "Response to Order No. 83" indicating its intention not to press the preliminary injunction under these and other circumstances of Civil Action 75-2311. Petitioner did so in the good faith belief that defendants and Judge Curtis were entitled to know its decision timely and that defendants particularly would be saved unnecessary effort in preparing written arguments *against* a preliminary injunction that plaintiff—deprived of the type of hearing deemed essential to proper presentation of its case<sup>57</sup>—did not intend to press via written arguments in the manner defined by Order No. 83. The result was an intemperate attack upon petitioner in Order No. 84 allegedly "Rejecting Plaintiff's Objections to Order No. 83" (Ex.Bk., Tab 30). Judge Curtis therein accuses petitioner of "refusal to obey the orders of this court", and of making a "totally false" contention as to severance of trademark and unfair competition issues from trade secret issues. But the court could not "order" anyone to seek or support a preliminary injunction, and Judge Curtis betrays his animus against petitioner by levelling an emotional and unwarranted accusation of "refusal to obey . . . orders" at a simple election, made as a matter of right, to forego proceeding further since the type of hearing petitioner actually sought and deemed necessary to its presentation of its case was not to be available.

<sup>57</sup> For example, Order No. 83 would allow oral testimony *only* if petitioner first shows who it desires to call, why this is necessary and "the subject matters they expect to question [adverse witnesses including some of the defendants themselves] on". The net result—to allow adverse parties whose veracity is highly suspect to tailor their answers in advance so as to avoid any revelation of the true facts at the hearing—a *fortiori* deprives petitioner of a fair chance to present its case for preliminary injunctive relief.

The charge of "totally false" contention likewise betrays animus. Order No. 83 (Ex.Bk., Tab 30) says *nothing* anywhere about trademark and unfair competition issues and suggests "the primary area of controversy will involve the question of whether or not plaintiff's claimed trade secrets are entitled to injunctive protection as bona fide trade secrets." Petitioner's expression in good faith of its understanding of Order No. 83 could not have been charged with "total falsity" by a detached, emotionally uninvolved judge.

[ending at p. 42, last line]

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OFFICE OF THE CLERK  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

U.S. Court of Appeals and Post Office Building  
7th & Mission Streets, P.O. Box 547  
San Francisco, California 94101

August 3, 1977

Edward S. Irons, Esquire  
Irons & Sears, P.C.  
Attorneys at Law  
1801 "K" Street, N.W.  
Washington, D.C. 20006

Re: Lee Pharmaceuticals v. U.S. District Court for  
the Central District of California No. 77-1969

Dear Mr. Irons:

Thank you for your letter of July 29 in reference to the order of this court, filed July 26, 1977 in the above-captioned case.

In answer to your first question, no, you will not be provided with a signed order. It is not the practice of this court to provide the signatures of judges on every order filed. Your reference to the Motion Calendar of 7/5/77 indicates that the original petition for writ of mandamus went to the motion panel of that date. This is properly shown on the initial order signed by Judges Ely, Hufstedler and Chambers, filed July 12, 1977, denying the petition.

The second question is answered in the affirmative, the request for reconsideration was considered by the same three judges on the Motion Calendar of 7/5/77. Motions panels consider matters in chambers without benefit of

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oral argument. If a request comes in for reconsideration, the judges communicate by phone, and the decision to either deny or grant is done at that time. In the instant case, the order of July 26, 1977, was filed pursuant to a signed certificate from Judge Hufstedler, attached to the order with the following language "All of the judges concerned concur in the within order. The Clerk will please file it."

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U.S. Circuit Judge

It is the procedure of this court, due to judges being in areas other than San Francisco, to file opinions, memorandums and orders with such a certificate. This certificate is always attached to the original document and kept in our permanent file. Under no circumstances are we permitted to release photo copies of the certificate. However, no one is precluded from looking at the certificate in this office.

I trust that this information will be helpful to you.

Sincerely yours,

/s/ Emil E. Melfi, Jr.  
EMIL E. MELFI, JR.  
Clerk of Court

EEM:grh

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**GENERAL ORDERS OF THE COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

General Order No. 4

Processing of Applications for Writs of Mandamus  
Prohibition and Other Extraordinary Writs  
Other than Habeas Corpus

Applications for writs of mandamus, prohibition and other extraordinary writs, whether addressed to an individual judge or to the Court, shall be deemed addressed to the Court unless, for emergency reasons, it is necessary for an individual judge to act thereon. Upon the filing of such an application, it shall, unless for emergency reasons an individual judge should act thereon, be immediately referred to a panel of three judges.

Pursuant to Rule 21(b), Federal Rules of Appellate Procedure, the panel shall first determine, ex parte, whether the subject matter is appropriate for writ procedure. If the panel determines that the subject matter is not appropriate for writ procedure, it shall deny the application forthwith, subject however to a petition for reconsideration. Such summary denial shall not be regarded as a decision on the merits. If the panel shall determine that the subject matter is appropriate for writ procedure, it shall order that an answer to the application be filed by the respondents within the time fixed by the order, and further proceedings thereon shall be had as provided in Rule 21(b) of the Federal Rules of Appellate Procedure.

If, by reason of emergency, it is necessary that such an application be first brought to the attention of an individual judge, he shall not deny the application, but may order that an answer be filed, all further proceedings to be had before a panel.

A panel or an individual judge may, in the event an order is entered calling for an answer, enter a stay order to the extent authorized by applicable rules and statutes.

\* \* \* \*

Note: At the Warner Springs meeting, on February 23 and 24, 1968, it was the general view that a General Order should be promulgated governing internal procedure in such matters. Such procedure will replace our present "Leave to File" procedure but has about the same effect.